JENNER & BLOCK LLP
STEVEN B. FABRIZIO (*pro hac vice*)
sfabrizio@jenner.com
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
Telephone: (202) 639-6000
Facsimile: (202) 661-4823

GIANNI P. SERVODIDIO (*pro hac vice*)
gps@jenner.com
919 Third Avenue, 37th Floor
New York, NY 10022
Telephone: (212) 891-1600
Facsimile: (212) 891-1699

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

COLUMBIA PICTURES INDUSTRIES, INC., *et. al.*

Plaintiffs,

v.

GARY FUNG, *et. al.*

Defendants.

Case No. CV-06-05578 SVW (JCx)

The Hon. Stephen V. Wilson

PLAINTIFFS' COMBINED RESPONSE TO DEFENDANTS' MOTIONS TO STRIKE AND EVIDENTIARY OBJECTIONS TO PLAINTIFFS' DECLARATIONS PURSUANT TO THE COURT'S AUGUST 25, 2009 ORDER RE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY

Ctrm: 6

REDACTED PURSUANT TO PROTECTIVE ORDER

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Plaintiffs submit the following combined response to the defendants' motions to strike and objections to the declarations of Richard Waterman, Ellis Horowitz, Duane C. Pozza, Thomas Sehested, Mark Ishikawa, Ben Grodsky, Jeffrey Bedser, Jane Sunderland, Jonathan Whitehead, David Kaplan, Alfred Perry, and Rani Cheerkori, submitted by plaintiffs pursuant to the Court's August 25, 2009 Order.

In response to the Court's August 25, 2009 Order requesting supplemental briefing, plaintiffs submitted detailed evidence establishing direct infringement by defendants' U.S. users. This evidence includes, *inter alia*:

1. Expert testimony from plaintiffs' statistician, Professor Richard Waterman establishing that, as a statistically certainty, defendants' U.S. users downloaded dot-torrent files corresponding to plaintiffs' copyrighted works;

2. Expert testimony from Professor Ellis Horowitz establishing that defendants' own data shows that defendants' U.S. users downloaded [redacted] unique dot-torrent files corresponding to plaintiffs' copyrighted works;

3. Testimony from Mr. Sehested, Mr. Ishikawa, Mr. Grodsky, and Mr. Bedser verifying that the dot-torrent files downloaded by defendants' U.S. users point to infringing copies of plaintiffs' works;

4. Testimony from plaintiffs verifying their ownership or control of the distribution rights in the works at issue and confirming that they did not authorize those works for distribution through defendants' websites or the BitTorrent network;

5. Testimony from plaintiffs' counsel summarizing and authenticating evidence in the record.

Defendants' response to this evidence is telling. Rather than counter plaintiffs' showing of direct infringement with any evidence, defendants have interposed a litany of indiscriminate objections and filed so-called "motions to strike" in response to all but one of plaintiffs' declarations. Defendants' barrage of objections is highly improper, but more importantly, provides no substantive basis

to exclude any of the testimony at issue. Indeed, even a cursory review of defendants' numerous submissions reveals that they are almost all essentially the same; in many cases defendants simply cut and pasted the identical boilerplate objections to much of plaintiffs' declarants' testimony without even pretending to argue how such objections relate to the pertinent testimony. For sake of the Court's time and resources, plaintiffs group defendants' similar objections together, beginning with objections common to all or nearly all declarations.[1]

ARGUMENT

I. General Objections Common to Multiple Declarations.

A. <u>Boilerplate objections</u>. For virtually all declarants, defendants make the identical boilerplate objections that the declarants lack personal knowledge, do not set out facts admissible in evidence, do not show that the declarant is competent to testify on the matters, and that their statements are based on hearsay and are irrelevant. However, defendants do not even attempt to connect their objections to specific testimony or issues. For this reason alone, defendants' objections should be overruled. *See Rodrigues v. City of Fresno*, No. 1:05CV1017, 2006 WL 1319407, at *3 (E.D. Cal. May 12, 2006) (boilerplate objections result in "unnecessary waste of resources by the parties and the Court"); *Brewer v. Fortis Ins. Co.*, No. C03-05150 SI, 2005 WL 645414, at *4 n.5 (N.D. Cal. Mar. 21, 2005) (overruling defendant's objections to plaintiff's expert declaration because they were boilerplate); *Nat'l Ctr. for Policy Analysis v. Fiscal Assocs., Inc.*, No. Civ. A. 97-2660, 2002 WL 433038, at *1 n.1 (N.D. Tex. Mar. 15, 2002) (overruling boilerplate

[1] Abbreviations are in the form "[Declarant] Decl." and [Declarant] Obj.," referring to the declaration submitted Sept. 15, 2009 for the declarant, and defendants' motion to strike and objections to the declarant's testimony, respectively. For example, "Pozza Decl." refers to the declaration of Duane C. Pozza submitted Sept. 15, 2009, and "Pozza Obj." refers to defendants' motion to strike and objections to that declaration.

objections to summary judgment evidence); *FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 54 n.9 (D.D.C. 1999) ("The Court may deem the objections to be waived . . . because it is so obvious that a party abuses the judicial system by indiscriminately asserting a blanket, boilerplate objection to every document offered by the opposing party.").

B. Relevance. Defendants cut and paste the same objection to each declaration based on "lack of relevance" under Fed. R. Evid. 401. *See* Horowitz Obj. 1, Waterman Obj. 1, Pozza Obj. 1, Sehested Obj. 1, Ishikawa Obj. 1, Grodsky Obj. 1, Bedser Obj. 1, Sunderland Obj. 1, Cheerkori Obj. 1, Kaplan Obj. 1, Whitehead Obj. 1, Perry Obj. 1. Again, this boilerplate objection should be rejected. Establishing relevance is a low burden that plaintiffs easily meet. *See* Fed. R. Evid. 401 (evidence is admissible that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993) (Rule 401 establishes "liberal" standard of relevance); *Ellis v. Pa. Higher Educ. Assistance Agency*, No. CV 07-04498 DDP (CTx), 2008 WL 5458997, at *10 (C.D. Cal. Oct. 3, 2008) ("FRE 401's test of relevance is a liberal one"). Here, defendants concede that Dr. Waterman's evidence of U.S. downloads is "an obvious conclusion," Defs' Mot. to Strike and Obj. to Supp. Waterman Decl. at ¶ 6; and they do not dispute Prof. Horowitz's evidence of downloads by U.S. users identified by their IP addresses. The remaining declarations provide conclusive evidence that the content files associated with the applicable dot-torrent files were infringing copies of plaintiffs' works. All of this unquestionably constitutes "relevant" evidence of direct infringement.

C. Lack of Discovery. Defendants object to plaintiffs' declarations arguing that information or testimony was not provided in discovery, and that defendants are "unfairly prejudiced by the same." *See* Waterman Obj. 7, Horowitz

Obj. 16, Pozza Obj. 5, Sehested Obj. 4, Ishikawa Obj. 4, Grodsky Obj. 6, Bedser Obj. 9, Cheerkori Obj. 3, Whitehead Obj. 3, Sunderland Obj. 3, Kaplan Obj. 3, Perry Obj. 3. Defendants' objection misses the mark. First, the Court invited additional evidence to augment the record in its Order, *see* August 25, 2009 Order at 4, and gave the defendants the opportunity to show disputed issues of fact in response, *id.*, but they have not done so.[2] Second, defendants ignore that Dr. Waterman and Dr. Horowitz rely solely on evidence that ***was produced either by defendants themselves*** or by plaintiffs in discovery, or that is publicly available. *See* Supp. Waterman Decl. ¶¶ 6-8; Supp. Horowitz Decl. ¶¶ 8, 14-19, 24; *see also* Bedser Decl.¶ 3; Pozza Decl ¶¶ 2-5 (same). Indeed, defendants admit that they produced the IP address information that is the source of Dr. Horowitz's analysis. Horowitz Obj. 10. Finally, defendants do not even purport to claim that they are entitled to or need additional discovery to respond to plaintiffs' declarations under the applicable standard under Fed. R. Civ. P. 56(f). *See Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986) ("References in memoranda and declarations to a need for discovery do not qualify as motions under Rule 56(f)."); *California ex rel. Cal. Dep't of Toxic Substances Control v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998) (party must set forth the particular facts expected from further discovery); *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1416 (9th Cir. 1987) (party must explain facts essential to justify its opposition).

D. Objection Based on Allegedly Conflating Dot-Torrent Downloads With Content Downloads.

Defendants indiscriminately object that plaintiffs' declarants conflate the fact of a dot-torrent download by a U.S. user with a download of the associated content

[2] As defendants note, plaintiffs served objections to defendants' first set of interrogatories on June 18, 2007. Defendants never even requested a meet-and-confer to discuss those objections, much less file a motion to compel.

file. *See* Waterman Obj. 2; Horowitz Obj. 9, 11, Pozza Obj. 4. Defendants are mistaken. Dr. Horowitz has testified that "[t]he only purpose of a dot-torrent file is to enable users to identify, locate, and download a copy of the actual content item referenced by the dot-torrent file," Supp. Horowitz Decl. ¶ 5, and that "[o]nce the user has clicked the 'download torrent' button or link, the user's computer is commonly configured such that the desired content file should begin downloading to the user's computer without any further action or input from the user," *id*. ¶ 6. Defendants offer no evidence to the contrary. Their so-called evidentiary objection is an attempt to rehash the same untenable legal arguments set forth in their supplemental brief, and provides no basis to exclude any of plaintiffs' testimony.[3]

II. Remaining Objections to Supplemental Waterman Declaration.

Defendants concede the accuracy of Dr. Waterman's conclusion that defendants' U.S. users repeatedly downloaded dot-torrent files corresponding to plaintiffs' copyrighted works (as listed in Ex. B to the September 4, 2007 Emerson Declaration). Indeed, defendants concede that "[s]uch a conclusion of likelihood is obvious." Waterman Obj. 6. Defendants' objection – that Dr. Waterman somehow dressed up an "obvious conclusion in a mathematical costume," *id*. – is not an actual substantive objection. As such, defendants do not seriously contest that Dr. Waterman's supplemental testimony satisfies the *Daubert* standards for admissibility of expert testimony under Fed. R. Evid. 702, because it based on sufficient data and applies an indisputably reliable methodology. *See Dorn v.*

[3] Defendants' only specific objection to the foregoing testimony is to incorporate their previous objections to Dr. Horowitz's testimony. *See* Horowitz Obj. 3. But, defendants' previous objections to Dr. Horowitz's declaration were mere boilerplate objections to his testimony "in its entirety"; the only specific portions of his testimony discussed in defendants' objections relate to filtering, which is not at issue here. *See* Defs' Objs. to Pls. Evid. Submitted in Support of Pls.' Mot. for Summ. Judg., dated Oct. 3, 2007 (Docket. #319), at 19-21.

Burlington N. Santa Fe R.R. Co., 397 F.3d 1183, 1196 (9th Cir. 2005) (*Daubert* sets forth a "liberal standard of admissibility"); *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 318 F. Supp. 2d 879, 889 (C.D. Cal. 2004) (recognizing a "presumption of admissibility" as to expert testimony); Fed. R. Evid. 702 advisory committee note (2000) ("the rejection of expert testimony is the exception rather than the rule").

Objection 1. Defendants argue that Dr. Waterman's testimony somehow fails to meet the low threshold for relevance because a "probability is not an 'actual dissemination' involving two or more participants." Obj. 1. This is meritless. Courts routinely rely on statistical evidence to establish relevant facts. *See, e.g.*, *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1184 (9th Cir. 2002) (holding statistical evidence sufficient to show certain facts). Here, Dr. Waterman testified that the probability that defendants' U.S. users downloaded torrent files for plaintiffs' works was so high that it was effectively "certain." Supp. Waterman Decl. ¶ 13. Given Dr. Horowitz's unrebutted testimony regarding the purpose and functionality of these dot-torrent files, Dr. Waterman's analysis and conclusions unquestionably constitute "relevant" evidence. *See supra* 1.B.

Defendants also argue that plaintiffs are required to prove a download by one U.S. user from another U.S. user, which Dr. Waterman did not purport to do. That argument is legally wrong, and in any event, provides no basis to exclude the testimony. *See* Pls.' Reply Br. at 1, 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 17.02, at 17-21 (rev. ed. 2009) ("regardless of how much infringing conduct may or may not occur abroad, when violation of one of the exclusive rights in copyrighted works is completed within the United States, the activity becomes actionable under domestic law"); *Los Angeles News Serv. v. Conus Commc'ns. Co.*, 969 F. Supp. 579, 583 (C.D. Cal. 1997); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014-15 (9th Cir. 2001) (download itself violates reproduction right).

Objection 2. Defendants speculate that the dot-torrent files for which Dr. Waterman analyzed the downloads may not point to infringing content. That is simply inaccurate. Plaintiffs' declarant James Emerson verified that these dot-torrent files lead to infringing content files. *See* Emerson Decl., Docket #255. Defendants have not challenged Mr. Emerson's conclusions and Dr. Waterman relies on this part of Emerson's analysis in support of his testimony. *See* Supp. Waterman Decl. ¶ 4.

Objection 3. Defendants vaguely object to Dr. Waterman's reliance on their own data showing that approximately [redacted] of all Isohunt and Torrentbox users are located in the United States. But defendants do not suggest that this data is wrong nor dispute that it is corroborated by: i) their own business records; ii) publicly available information, *see* Supp. Waterman Decl. ¶ 6, Ex. B; Pozza Decl. ¶ 2, Ex. 1, and iii) Dr. Horowitz's analysis of the evidence in the record, *see* Supp. Horowitz Decl. ¶ 24, Ex. 5, 6. In view of the foregoing, Dr. Waterman need not have considered "alternative evidence." *See Boyd v. City & County of San Francisco*, 576 F.3d 938, 946 (9th Cir. 2009) (rejecting conclusory criticisms of expert methodology where opposing party failed to suggest reliable alternatives).

Objection 4. Defendants object to Dr. Waterman's reliance on Dr. Horowitz's analysis of IP address data on the grounds that they erroneously produced the IP address data in response to the Magistrate Judge's Server Log Order. This objection is also directed to Dr. Horowitz (Obj. 10). Defendants are mistaken. Dr. Horowitz specifically identifies the database tables on which he relies for his analysis, *see* Supp. Horowitz Decl. ¶¶ 16-19, and defendants produced these database tables in discovery long *before* the Server Log Order and *before* defendants produced the Server Log Data with redacted IP addresses. While it is no substitute for what unredacted Server Log Data would reveal, it is a separate set of data. Supp. Horowitz Decl. ¶ 22.

Objection 5. Defendants make boilerplate hearsay, personal knowledge, and Fed. R. Evid. 702 and 703 objections to Paragraph 8. In Paragraph 8, Dr. Waterman merely notes that his reliance on Mr. Emerson's download analysis is a conservative measure of the number of downloads of dot-torrent files for plaintiffs' copyrighted works, as defendants only produced less than a month of server log data to plaintiffs. Dr. Waterman's testimony about the limitations of the available data (as analyzed by others) is full supported and defendants have not even attempted to articulate any basis for it to be excluded. *See Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1142 (9th Cir. 1997) (expert testimony may be admitted where work being analyzed was done by others); *Doe v. Cutter Biological, Inc.*, 971 F.2d 375, 385 n.10 (9th Cir. 1992) (expert may "base her or his opinion on data 'made known to the expert,' which 'need not be admissible in evidence.'"); *Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 94-95 (2d Cir. 2000) (holding that an expert may rely on data provided by other experts).

Objection 6. Defendants object on hearsay, personal knowledge, and Fed. R. Evid. 702 and 703 grounds to Paragraphs 9 through 13, in which Dr. Waterman explains the methodology and calculations of his analysis. The hearsay and personal knowledge objections to Dr. Waterman's expert testimony are meritless. Rule 703 expressly permits experts to base opinions or inferences on "facts or data … not admissible in evidence" that are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject." Fed. R. Evid. 703; *see, e.g.*, *Doe*, 971 F.2d at 385 n.10 (expert may "base her or his opinion on data 'made known to the expert,' which 'need not be admissible in evidence.'").

Indeed, defendants have no substantive criticism of Dr. Waterman's methodologies or conclusions. Dr. Waterman testified that he applied "universally accepted statistical principles," using a common statistical model explained in a leading treatise in the field, to analyze the available download data. Supp.

Waterman Decl. ¶ 9. The equations and calculations he used are set forth in Paragraphs 9-10 and Exhibit C. Defendants do not argue with any of these calculations – indeed, they concede that Dr. Waterman's conclusion is "obvious." His testimony is reliable and should be accepted. *See Dorn*, 397 F.3d at 1196; *Silicone Gel*, 318 F. Supp. 2d at 889; Fed. R. Evid. 702.

III. Remaining Objections to Supplemental Horowitz Declaration.

Defendants make no substantive objections to Dr. Horowitz's methodology or conclusions. As explained by Dr. Horowitz and unrebutted here, defendants' own data shows that their U.S. users downloaded [redacted] different dot-torrent files confirmed as corresponding to plaintiffs' copyrighted works, [redacted]. Supp. Horowitz Decl. ¶ 21, Ex. 1. His conclusions readily meet the applicable threshold for admissibility under *Daubert* and should be accepted. *See Dorn*, 397 F.3d at 1196; *Silicone Gel*, 318 F. Supp. 2d at 889.

Objection 2, 11. Defendants object to Paragraphs 4 and 14-22 and Exhibit 1 on hearsay, lack of personal knowledge, and Fed. R. Evid. 702 and 703 grounds. These are meritless. In Paragraph 4 and Exhibit 1, Dr. Horowitz summarizes his analysis *of defendants' own data* to demonstrate downloads by defendants' U.S. users. Defendants do not identify any supposed "assumptions" Dr. Horowitz made that undermine his conclusions. Moreover, defendants are in possession *of the same data*, yet raise no substantive objection to his methodology or conclusions. Dr. Horowitz adequately explains the bases of his conclusions and reliable methodology he followed to analyze the data. *See Dorn*, 397 F.3d at 1196 (Rule 702 contains "liberal standard of admissibility"); Fed. R. Evid. 702 advisory committee note (2000) ("the rejection of expert testimony is the exception rather than the rule"); *see also Silicone Gel*, 318 F. Supp. 2d at 889; *Boyd*, 576 F.3d at 946 (rejecting conclusory criticisms of expert methodology).

Further, defendants' hearsay and personal knowledge objections are groundless as Rule 703 permits experts to base opinions or inferences on "facts or data … not admissible in evidence" that are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject." Fed. R. Evid. 703; *see Doe*, 971 F.2d at 385 n.10 (same).

Finally, defendants' assertion that Dr. Horowitz is "speculating" about the operation of defendants' website is flatly contradicted by Dr. Horowitz's testimony that he reviewed the data and source code produced by defendants as well as the website. Supp. Horowitz Decl. ¶¶ 2, 8, 14-16. Dr. Horowitz also makes clear that the verification of the content file corresponding to the downloaded dot-torrent file was carried out by other declarants, as shown in the Grodsky, Ishikawa, Sehested, Bedser, and Friedman declarations. *Id*. ¶ 21.

Objection 4. Defendants object to paragraphs 9 through 13, regarding Dr. Horowitz's explanation of Server Log Data, based on boilerplate Fed. R. Evid. 401, 702, and 703 objections, and objections to its "tenor." Dr. Horowitz has provided an adequate foundation for his analysis of the operation of defendants' website, and defendants can point to no flaw in his methodology. *See supra* Horowitz Obj. 2, 11. Dr. Horowitz explains the relevance of what the Server Log Data would show in Paragraphs 9 through 12, independent of his understanding (discussed in ¶ 13) whether defendants provided it in useful form (which they indisputably did not).

Objection 5, 7, 9. Defendants object that Dr. Horowitz has "conflated" torrent site and tracker data in Paragraphs 9, 10, and 12, citing objections on the grounds of hearsay, personal knowledge, and Fed. R. Evid. 702 and 703. However, defendants do not explain what facts they believe he has conflated. Dr. Horowitz in fact discusses what each source of data – from the torrent site and from the tracker – would separately show in Paragraphs 9 and 10, and summarizes those points in Paragraph 12.

Regarding Paragraphs 10 and 12, defendants purport to object to Dr. Horowitz's testimony because they despoiled the very Server Log Data for the tracker the Court had ordered them to produce and preserve. But that is not a proper objection. Dr. Horowitz's analysis, which has been accepted by the Magistrate Judge in multiple orders, merely reiterates what the Server Log Data would show *had it been preserved*. *See* First Server Log Order at 5-10. Moreover, Dr. Horowitz explains his analysis in Paragraphs 9-12, and it is in no sense "conclusory." Thus, his conclusions about Server Log Data are reliable and should be accepted. *See Dorn*, 397 F.3d at 1196; *Silicone Gel*, 318 F. Supp. 2d at 889; Fed. R. Evid. 702.

Objection 6. Defendants' objections to Paragraph 10 based on hearsay, personal knowledge, and Fed. R. Evid. 702 and 703 should be overruled. Defendants object to use of the word "identify" as vague, but that is not a ground for excluding this testimony. In fact, Dr. Horowitz's point is clear: Server Log Data would allow plaintiffs to identify the IP address of defendants' users downloading dot-torrent and content files. Further, the phrase "in the normal course" is not without foundation; it is supported by Dr. Horowitz's analysis of the operation of dot-torrent file downloads in Paragraphs 4-5. *See supra* Part I-C. And the defendants' argument that Dr. Horowitz *could have* tested his analysis by other means (which defendants also could do, but have not) is irrelevant; what matters for purposes of admissibility is that Dr. Horowitz's analysis is based on sound methodologies – in this case, his familiarity with defendants' websites, and analysis of the BitTorrent downloading process. *See Boyd*, 576 F.3d at 946; *Dorn*, 397 F.3d at 1196; Supp. Horowitz Decl. ¶ 2; Sept. 6, 2007 Horowitz Decl. (Doc. #310), ¶¶ 3-7. *See also supra* Horowitz Obj. 2, 11 (hearsay and personal knowledge objections meritless).

Objection 8. Paragraph 11 establishes that the geographic location of a downloading user can be established using IP addresses in the server log data.

Defendants do not dispute or even address that point; their objections merely reiterate boilerplate hearsay and personal knowledge objections, alleged conflation of dot-torrent downloads and content downloads, and alleged conflation of torrent site and tracker data. These objections are addressed above. *Supra* Part I-C; Horowitz Obj. 2, 11; Horowitz Obj 5, 7, 9.

Objection 10. Defendants object to the use of IP addresses that defendants themselves provided in discovery. As explained above in regard to Dr. Waterman's testimony, this objection is meritless. Dr. Horowitz specifically identifies the database tables on which he relies for his analysis, *see* Supp. Horowitz Decl. ¶¶ 16-19, and defendants' database tables were produced separately in discovery before production of Server Log Data with redacted IP addresses. *Id*. ¶¶ 13,22.

Objection 15. Defendants object to Paragraph 25 and Exhibit 7 on the grounds of Rules 702 and 703. However, defendants identify no defects in the methodology or bases of Dr. Horowitz's testimony here; he merely extracted [redacted] Dr. Horowitz also testifies that the seeder and leecher data shows that other users have downloaded or are downloading the content file to which the dot-torrent file corresponds. Defendants argue, without support, that the lack of any online "seeders" at the snapshot in time of this data means that the "leechers" were not receiving content. But defendants ignore evidence that [redacted]. *See* Pozza Decl. ¶¶ 3, 4, Ex. 3; Pls' Statement of Undisputed Facts ("SUF") 65, 66. Whether or not there was an online seeder at the point in time the data was collected, the leecher data

clearly shows downloading of the content.[4] In any event, defendants' objection here is merely argumentative – it is not a ground for excluding the evidence altogether.

IV. Remaining Objections to Pozza Declaration.

Objection 2. Defendants object to Paragraph 3 of the Pozza Declaration, (which summarizes evidence of [redacted] on the grounds of hearsay), lack of personal knowledge, and Fed. R. Evid. 702 and 703. However, this paragraph merely summarizes evidence established elsewhere in the record for the Court's convenience; the declarant does not seek to establish facts by his testimony. As explained in Paragraph 3, evidence of [redacted] is presented in Pls.' SUF 65 and 66, and the Supplemental Horowitz Declaration ¶ 25 and Exhibit 7. Dr. Horowitz testifies that the leecher statistics indicate downloads by other users. Supp. Horowitz Decl. ¶ 25.

Objection 3. Defendants object to evidence based on the statements of the Podtropolis site "VIP" "Firrasaltaher" on the grounds of relevance, hearsay, lack of personal knowledge, and Fed. R. Evid. 702 and 703. As explained in Paragraph 4 of the Pozza Declaration, Firrasaltaher [redacted]. The evidence submitted by Dr. Horowitz [redacted] and identifies "leechers" who have or are downloading those content files. Plaintiffs identified Firrasaltaher generally as a "moderator" but, more specifically, he has "VIP" status which affords him greater site privileges than normal users, even if defendants do not consider him

[4] Defendants confuse Exhibit 1, which provides evidence of *downloads* of certain dot-torrent files from U.S. users, with Exhibit 7, which provides evidence of downloads of content files corresponding to dot-torrent files *uploaded* by U.S. users. There is one title (Prison Break, Season 2, Episode 16), for which there is evidence of both.

to be a moderator. *See* Pls.' SUF 36. His statements here are admissible because [redacted] and he is unavailable as his identity is anonymous. *See United States v. Winn*, 767 F.2d 527, 530-31 (9th Cir. 1985) (statements against interest admissible where address of witness unknown); *United States v. Olafson*, 213 F.3d 435, 441-42 (9th Cir. 2000) (same). Firrasaltaher also has personal knowledge of [redacted]. Thus, this evidence is clearly admissible. Defendants' conclusory assertions that his statements are not credible, for unexplained reasons, do not provide a basis for excluding them from evidence, *see Boyd*, 576 F.3d at 946, nor do they create an issue of fact. *See Newman v. County of Orange*, 457 F.3d 991, 995 (9th Cir. 2006) ("conclusory allegations, standing alone, are insufficient to prevent summary judgment"); *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978) ("legal memoranda and oral argument are not evidence, and they cannot by themselves create a factual dispute").

Defendants also argue, without evidentiary support, that the "seeder" count of 0 for the dot-torrent files [redacted] shows that there was no actual dissemination of the content file. This argument badly misapprehends the evidence. Leaving aside the issue of whether *offering* a work for distribution violates plaintiffs' exclusive rights, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014-15 (9th Cir. 2001) ("Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights"), the unrebutted evidence establishes that the infringing works [redacted] were *actually distributed*. As explained by Dr. Horowitz, whether or not there was an online seeder count of "0" at the point in time the data was collected is irrelevant: the fact that were "leechers" for the works in question data shows downloading of the underlying content file. Supp. Horowitz Decl. ¶ 25. The Fed. R. Evid. 702 and 703 objections here are misguided, as Dr. Horowitz testified to his analysis of the data,

discussed above at Horowitz Obj. 15. Mr. Pozza does not purport to testify as an expert.

Objection 4. Defendants object to Exhibit 5 to the Pozza declaration on relevance grounds. Paragraph 5 of the Pozza Declaration and Exhibit 5 simply summarize the evidence of direct infringement by U.S. users. *See* Fed. R. Evid. 1006; *United States v. Catabran*, 836 F.2d 453, 458 (9th Cir. 1988) ("The chart is admissible as a summary under Rule 1006 if the underlying documents are admissible and available to the opponent for inspection"). Defendants argue that this Paragraph and Exhibit do not distinguish between downloads of dot-torrent files and downloads of content files, and that plaintiffs much show a dissemination of infringing materials "entirely within the United States." Those arguments are meritless. *Supra* Part I-C; Waterman Obj. 1. Defendants also argue the Masciarelli, Geniac, and Firrasaltaher evidence is insufficient because plaintiffs may not have all information about the dot-torrent files uploaded and/or downloaded by those individuals (such as the infohash values). That is irrelevant because those three individuals [redacted], which is not controverted by defendants.

V. Remaining Objections to Sehested, Ishikawa, and Grodsky Declarations.

Objection 1 to Sehested, Ishikawa, and Grodsky. Defendants object to the declarations on Fed. R. Evid. 401 relevance grounds, asserting that the declarants do not implicate defendants anywhere in the course of identifying the dot-torrent files and infringing content files. Defendants' objection is misguided. Dr. Horowitz's testimony expressly links the defendants' U.S. users' downloads to the dot-torrents analyzed by the declarants. Supp. Horowitz Decl. ¶ 21, Ex. 1. The declarants here testify to downloading and verifying the content associated with the dot-torrent files identified on Exhibit 2 to their respective declarations and defendants do not purport to object to this testimony identifying the verified content files in Paragraphs 3 and 4

and Exhibit 2. Separately, Dr. Horowitz has testified that these dot-torrent files corresponding to content files were downloaded by defendants' U.S. users. Supp. Horowitz Decl. ¶ 21, Ex. 1; *see also* Pozza Ex. 5 (summarizing content verification source for each dot-torrent file identified as downloaded by U.S. users by Dr. Horowitz).[5] Thus, the relevance objection is baseless. *See Daubert*, 509 U.S. at 587 (Rule 401 is "liberal" standard of relevance); *Ellis*, 2008 WL 5458997, at *10 (same).

Objection 2 to Sehested, Ishikawa, and Grodsky. Defendants object to the declarations on the grounds of hearsay, personal knowledge, and Fed. R. Evid. 702 and 703, because a portion of each declarant's analysis was performed by personnel acting under the declarant's supervision. However, it is hornbook law that personal knowledge includes knowledge gained from persons acting under one's supervision. *See Daily Herald Co. v. Munro*, 758 F.2d 350, 355 n.6 (9th Cir. 1984) ("personal knowledge may be inferred to one in a responsible, supervisory position, where that person is required to be familiar with the practices of those he supervises"); *see also United States v. Scales*, 594 F.2d 558, 563 (6th Cir. 1979) (holding that individual who supervised compilation and organization of chart was proper witness to introduce it). Indeed, it is well-settled that "[k]nowledge acquired through others may still be knowledge within the meaning of Fed. R. Evid. 602." *Agfa-Gevaert, A.G. v. A.B. Dick Co.*, 879 F.2d 1518, 1523 (7th Cir. 1989); *see also L.A. Times Commc'ns LLC v. Dep't of the Army*, 442 F. Supp. 2d 880, 886 (C.D. Cal.

[5] As Dr. Horowitz explains in Paragraph 7 of his supplemental declaration, without rebuttal, "[a]n infohash identifies a specific content file. Any dot-torrent file with the same infohash corresponds to the same content file. Thus, any user who downloads a file represented by a particular infohash value will receive exactly the same content file, that is an exact digital copy of the content file. It does not matter whether the dot-torrent file represented by the infohash was obtained from the Isohunt website, one of defendants' other websites or another source altogether."

2006) ("Although first-hand observation is the most common form of personal knowledge, first-hand observation is not the only basis for personal knowledge").

Nor does reliance on such personnel create hearsay problems. *See Agfa-Gevaert*, 879 F.2d at 1523 ("Knowledge acquired through others may still be personal knowledge within the meaning of Fed. R. Evid. 602, rather than hearsay, which is the repetition of a statement made by someone else – a statement offered on the authority of the out-of-court declarant and not vouched for as to truth by the actual witness"). Defendants also fail to address that the content verification information was stored in the regular course of business as a business record, as discussed in Paragraph 4, and is also admissible on that basis. *See U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040, 1043-44 (9th Cir. 2009); Fed. R. Evid. 803(6). Defendants question, in conclusory fashion, the "veracity, professionalism, quality or integrity" of the declarant's personnel, but these are not objections to admissibility. And such conclusory objections cannot create an issue of fact. *See Newman*, 457 F.3d at 995; *British Airways*, 585 F.2d at 952.

Finally, Rule 702 and 703 do not apply because the declarants are being offered as fact witnesses, not expert witnesses. The declarants testify as to the downloading, reviewing, and identifying content files associated with dot-torrent files. They have done so in the course of their job responsibilities, in which each has extensive experience downloading, and analyzing content files from BitTorrent, as discussed in Paragraph 1 of each declaration. The declarants may testify as lay witnesses on such routine matters. *See United States v. Hairston*, 64 F.3d 491, 493 (9th Cir. 1995) (lay witnesses may testify on facts perceived in course of

employment); *Dorn*, 397 F.3d at 1192 (lay witnesses may testify about their own perceptions).[6]

Objection 3 to Sehested and Ishikawa, and Objection 5 to Grodsky. Defendants object that each declarant is testifying as an expert witness not previously disclosed, and that defendants are prejudiced by lack of discovery. As explained above, the declarants are in fact testifying as lay witnesses. *See* Obj. 2. Moreover, defendants' objection that they are prejudiced by lack of additional discovery is meritless. *See supra* Part I-B.

Objections 3 and 4 to Grodsky. Defendants object based on hearsay, personal knowledge, and Fed. R. Evid. 702 and 703, to a single line in Paragraph 3 of the Grodsky Declaration where he describes that the dot-torrent files downloaded by Peer Media Tech correspond to content files that are identified by an infohash value. The hearsay and personal knowledge objections are meritless because Mr. Grodsky testifies in Paragraph 3 that persons under his supervision actually downloaded and reviewed both the dot-torrent files and content files. *See supra* Grodsky Obj. 2. The Rules 702 and 703 objections do not apply because Mr. Grodsky is merely describing the downloaded dot-torrent files and content files by the publicly accessible infohash value. *Id*. Mr. Grodsky is not purporting to testify generally about infohash values; Dr. Horowitz's uncontroverted testimony separately establishes the uncontroversial point that a dot-torrent file's infohash value corresponds to a unique content file, Supp. Horowitz Decl. ¶ 7.

[6] Even if the testimony was to be considered under Rule 702 and 703, defendants provide no basis for criticizing the declarants' methodology or bases of their testimony. *See Dorn*, 397 F.3d at 1196; *Silicone Gel*, 318 F. Supp. 2d at 889; Fed. R. Evid. 702, 703.

VI. Remaining Objections to Bedser Declaration.

Mr. Bedser supervised and is familiar with the analysis done by Mr. Emerson reflected in the Sept. 4, 2007 Emerson Declaration (Docket #255) filed in support of Plaintiffs' Motion for Summary Judgment. Mr. Bedser summarizes that analysis in Paragraph 3 of his declaration, and testifies that he has identified the unique infohash value for two of the dot-torrent files for which Mr. Emerson previously downloaded and verified the infringing content. Dr. Horowitz has separately confirmed that dot-torrent files were downloaded by U.S. users.[7]

Objection 1. Defendants object to the declaration based on relevance, arguing that Mr. Bedser does not show a specific instance of infringement by defendants' users. As explained above, Dr. Horowitz demonstrates U.S. user downloads of dot-torrent files pointing to dot-torrent files identified by Mr. Bedser. Supp. Horowitz Decl. ¶¶ 4, 14-21, Ex. 1.

Objection 2. Defendants object to Paragraph 3 on the grounds of hearsay, personal knowledge, and Fed. R. Evid. 702 and 703. In this paragraph, Mr. Bedser summarizes the activities of persons acting under his supervision, previously testified to in the Emerson Declaration. Mr. Bedser is permitted to rely on personal knowledge gained by supervision to summarize what those under his supervision have done, and such testimony is not hearsay. *See Daily Herald*, 758 F.2d at 355 n.6; *Sutton*, 795 F.2d at 1057; *Agfa-Gevaert*, 879 F.2d at 1523; *L.A. Times Commc'ns*, 442 F. Supp. 2d at 886. Moreover, Mr. Bedser's summary does not required specialized technical knowledge under Rules 702 and 703. Finally, his

[7] Dr. Horowitz's identification of specific instances of downloads of 2 dot-torrent files by U.S. users, based on the limited set of data produced by defendants, is in addition to Dr. Waterman's uncontroverted testimony that *all* of the works identified in Emerson Declaration Exhibit B, as a matter of statistical probability, were certainly downloaded by at least one U.S. user.

testimony in Paragraph 3 is not offered to re-establish Mr. Emerson's testimony, but to summarize it as context for his testimony in Paragraph 4.

Objection 3. Defendants object to a single line in Paragraph 4 of the Bedser Declaration where he describes that the dot-torrent files downloaded by ICG correspond to content files identified by an infohash value, based on hearsay, personal knowledge, and Fed. R. Evid. 702 and 703. This objection is addressed above in regard to the Grodsky Declaration, *supra* Grodsky Obj. 3, 4, and fails for the same reason here. Mr. Bedser has personal knowledge of the dot-torrent files and associated content files that his describing. *Supra* Bedser Obj. 2.

Objections 4, 6. Defendants object to Paragraph 4 on the grounds of hearsay, personal knowledge, and Fed. R. Evid. 702 and 703. As explained above, Mr. Bedser is permitted to rely on personal knowledge gained by supervision to summarize what those under his supervision have done. *Supra* Bedser Obj. 2. His identification of dot-torrent files that correspond to content files by their publicly accessible infohash value, based on actual download and review of those files, is admissible lay testimony. *See Hairston*, 64 F.3d at 493; *Dorn*, 397 F.3d at 1192. Mr. Bedser also summarizes Mr. Emerson's previous verification of the content files; defendants' "objection" that Mr. Emerson provided more details about what he did than Mr. Bedser here is misguided, as Mr. Bedser is not purporting to restate or modify Mr. Emerson's testimony.

Objection 5. Defendants object to Mr. Bedser testifying about his "understanding" that the dot-torrent files were downloaded by U.S. users. However, Mr. Bedser is not purporting to testify himself about such downloads by U.S. users; that analysis was done by Dr. Horowitz.

Objection 7. Defendants object to the "lack of specificity" in Mr. Bedser's description of Isohunt and Torrentbox. This is mere argument, not an evidentiary objection. *See Newman*, 457 F.3d at 995; *British Airways*, 585 F.2d at 952.

Objection 8. Defendants object that Mr. Bedser is testifying as an expert witness not previously disclosed and that they are prejudiced by lack of discovery. As explained above, Mr. Bedser's limited testimony here does not require any specialized knowledge or expertise. Defendants are also wrong that they had no opportunity for discovery related to his testimony. Plaintiffs produced the dot-torrent files downloaded by ICG as part of Mr. Emerson's disclosures. Defendants could analyze those dot-torrent files and controvert his testimony if it was wrong, but have not done so. *See also supra* Part I-B.

VII. Remaining Objections to Studio Declarations (Whitehead, Sunderland, Kaplan, Perry, and Cheerkori)

Objection 2. Defendants argue that each studio declaration is "devoid of merit." That is an argument about the weight of the evidence, not a basis for exclusion. *See United States v. Tank*, 200 F.3d 627, 631 n.5 (9th Cir. 2000) (arguments with accuracy of evidence go to weight not admissibility). But in any event, defendants' argument here is fundamentally misguided. Defendants argue that the studio declarants have not ruled out the possibility that the plaintiffs have released free trailers or restricted versions of those copyrighted works, or that they released "spoof" (or fake) dot-torrent files for those works. These points are irrelevant. Plaintiffs' evidence establishes that defendants' U.S. users infringed one or more content files that have been verified as corresponding to one of plaintiffs' copyrighted works. The source of the verification of the content file(s) for each copyrighted work is listed on the summary Pozza Exhibit 5. Those content files were thus verified not to be trailers or spoofs. For these reasons, defendants' objections should all be overruled, and the motions to strike should be denied.

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Respectfully submitted,

JENNER & BLOCK LLP

By: _____
Gianni P. Servodidio

STEVEN B. FABRIZIO
GIANNI P. SERVODIDIO
JENNER & BLOCK LLP

KAREN R. THORLAND
W. ALLAN EDMISTON
LOEB & LOEB LLP

LISA E. STONE
MOTION PICTURE ASSOCIATION OF AMERICA

Attorneys for Plaintiffs